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BORNEO SAMUDERA SDN BHD

v.

SITI RAHFIZAH MIHALDIN & ORS

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: S-02-935-2007]

C

25 FEBRUARY 2008

CIVIL PROCEDURE: *Stay of proceedings - Arbitration agreement - Referral of dispute to arbitration - Jurisdiction of court - Whether arbitration agreement null and void - Arbitration Act 2005, s. 10(1) - Contracts Act 1950, s. 29*

D

ARBITRATION: *Agreement - Referral of dispute to arbitration - Jurisdiction of court - Whether arbitration agreement null and void - Arbitration Act 2005, s. 10(1) - Contracts Act 1950, s. 29*

E

This was an appeal against the order of the High Court dismissing the appellant's application to stay a suit before that court and to have the dispute referred to arbitration. The appellant and the 3rd to 821st respondents were parties to a Joint Venture Agreement containing an arbitration agreement. The 1st and 2nd respondents

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later commenced an action in the High Court against the instant appellant and another defendant. The appellant applied to stay the action, relying on s. 10(1) of the Arbitration Act 2005 ('Act'). The High Court judge dismissed the application on the following two grounds: (i) the arbitration agreement was null and void because

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it ousted the jurisdiction of the court; and (ii) there would be a multiplicity of actions and the same issues would be ventilated in the arbitration proceedings as well as the court.

Held (allowing the appeal)

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Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The arbitration agreement was not void. Exceptions 1 and 2 to s. 29 of the Contracts Act 1950 make that absolutely clear.

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These exceptions house the *ratio* in *Scott v. Avery*, namely that an agreement to arbitrate does not oust the jurisdiction of the

ordinary courts and is, therefore, not illegal and void. Were it otherwise, no arbitration clause would ever survive. Also, having regard to the facts of this case, the opposition to the stay did not fall within s. 10(1)(a) or (b) of the Act. (para 9)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan menentang arahan Mahkamah Tinggi menolak permohonan perayu untuk menggantungkan suatu guaman di mahkamah tersebut dan untuk pertikaian itu dirujuk ke timbangtara. Perayu dan responden ketiga hingga ke-821 merupakan pihak kepada satu Perjanjian Usahasama yang mengandungi perjanjian timbangtara. Responden pertama dan kedua selepas itu membawa tindakan di Mahkamah Tinggi terhadap perayu terkini dan seorang lagi defendan. Perayu memohon untuk menggantungkan tindakan tersebut, mengharapkan s. 10 Akta Timbangtara 2005 ('Akta'). Hakim Mahkamah Tinggi menolak permohonan itu atas kedua-dua alasan berikut: (i) perjanjian timbangtara tersebut batal dan tak sah kerana ia menyingkirkan bidangkuasa mahkamah; dan (ii) akan terdapat tindakan kepelbagaian dan isu-isu yang sama akan dihujahkan di dalam prosiding timbangtara dan juga di mahkamah.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Perjanjian timbangtara tersebut tidak batal. Pengecualian 1 dan 2 dari s. 29 Akta Kontrak 1950 membuatnya teramat jelas. Pengecualian tersebut menumpangkan *ratio* di dalam *Scott v. Avery*, iaitu satu perjanjian untuk timbangtara tidak menyingkirkan bidangkuasa mahkamah biasa dan, oleh itu, tidak menyalahi undang-undang dan batal. Jikalau ia berlainan, tiada satu pun klausa timbangtara yang dapat wujud. Juga, berhubungan dengan fakta kes ini, penentangan terhadap penggantungan tidak terangkum dalam s. 10(1)(a) atau (b) Akta.

Case(s) referred to:
Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***
Scott v. Avery [1856] 10 ER 1121 ***(foll)***

Legislation referred to:
Arbitration Act 2005, s. 10(1)(a), (b)
Contracts Act 1950, s. 29

For the appellant - Ho Kin Kong (Mohd Azahari Matiasin with him); M/s Ho Chong Yong
For the respondents - Puan Sri Marina Tiu; M/s CJ Liew & Co

[Appeal from High Court, Tawau; Suit No: T(22)-41-2007]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This appeal is directed against the order of the High Court of Tawau dated 9 August 2007 dismissing the appellant's (2nd defendant's) application to stay Suit No. T(22)-41 of 2007 before that court and to have the dispute referred to arbitration. The brief facts of the case are as follows.

[3] The appellant and the 3rd to 821st respondents are parties to a joint venture agreement dated 9 July 1998 which contains an arbitration agreement in the following terms:

> In the event that any of such dispute, difference or question which may arise under, or out of, in connection with or in relation to this Agreement cannot be resolved amicably then such disputes, difference or question shall be settled by arbitration and in accordance with the provisions of the Arbitration Act or any statutory modification or re-enactment thereof for the time being in force. Any such arbitration shall be conducted in the English language, at Kota Kinabalu, Malaysia or at another location mutually nominated by the Parties hereto. The Party in whose favour the arbitration award is granted shall be entitled to recover costs and expenses of administration of the arbitration proceedings. Any arbitration award granted shall be final and binding on the Parties and is not subject to appeal and shall be enforceable by any Court of competent jurisdiction.

[4] By a writ dated 31 March 2006, the 1st and 2nd respondents commenced an action in the High Court against the instant appellant and another defendant. By a summons in chambers dated 1 June 2007 the appellant applied to stay the action. It relied on s. 10(1) of the Arbitration Act 2005 which is in the following terms:

> 10(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in proceedings, stay those proceedings and refer the parties to arbitration unless it finds:
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[5] The learned judge in the High Court dismissed the summons on the following two grounds:

(i) the arbitration agreement is null and void because it ousts the jurisdiction of the Court; and

(ii) because there would be a multiplicity of actions and the same issues would be ventilated in the arbitration proceedings as well as the court.

[6] Before us, counsel for the respondents, Marina Tiu, in supporting the learned judge's decision has argued that the appeal should be dismissed because the appellant had taken a step in the proceedings, thereby depriving it of its right to seek a stay. She has drawn our attention to a previous application made by the appellant dated 26 May 2006. In that application, the appellant sought an order for stay and in the alternative to transfer the suit to the High Court in Tawau, Sabah. We have perused the order made on that application and find that the learned judge did transfer the suit to Tawau and disallowed the other prayers but granted the appellant liberty to file afresh. We accordingly find no merit in the argument of the respondents' counsel that this is a case where the doctrine of issue estoppel would apply. In our judgment no issue was determined by the High Court hearing at

28 March 2007. All that happened was that the suit was transferred to Tawau and the appellant's right to make a fresh application for stay preserved.

[7] Learned counsel for the respondents takes a further point. She argues that in the present summons, that is, in the application that forms the subject matter of this appeal, the appellant apart from asking for stay also moved the court for an alternative order for security for costs, which she said is a step in the proceedings. She submits that by asking for security for costs the appellant has submitted to the jurisdiction of the court and is therefore not entitled to the stay.

[8] With respect, we reject this argument. The primary application of the appellant was to stay the action. The alternative prayer was made in the event that the High Court was not with the appellant in the primary relief it sought. This in our judgment, neither amounts to a step in the proceedings nor does it constitute submission to jurisdiction. It may have been otherwise if the appellant had made a separate application for security for costs and then later moved the court for a stay.

[9] To summarise, we are not in agreement with the learned judge that the arbitration agreement is void. Exceptions 1 and 2 to s. 29 of the Contracts Act 1950 make that absolutely clear. These exceptions house the ratio in *Scott v. Avery* [1856] 10 ER 1121, namely that an agreement to arbitrate does not oust the jurisdiction of the ordinary courts and is therefore not illegal and void. Were it otherwise, no arbitration clause would ever survive. We may add that we are also satisfied, having regard to the facts of this case, the opposition to the stay does not fall within s. 10(1)(a) or (b) of the Arbitration Act 2005.

[10] For the reasons already given, this appeal is allowed. The orders of the learned judge are hereby set aside. There shall be an order in terms of prayer (a) of the appellant's summons dated 1 June 2007. The action is hereby stayed. The respondents must bear the costs here and below. The deposit in court shall be refunded to the appellant.

[11] One final point. This morning we were moved for a stay of proceedings before the High Court in Tawau. Since all the relevant materials are before us, with the consent of counsel, we ordered that the motion be treated as the appeal proper and dispensed with compliance of the Rules of the Court of Appeal 1994. We have ample jurisdiction to do this. See: *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122.